

U.S. Department of Labor

Board of Contract Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)



September 27, 1999

Case Nos.: 1997-BCA-4, 1999-BCA-2

Appeal of

BRERO CONSTRUCTION, INC.

Contract No.: E-4098-3-00-82-20

**RULING DENYING CONTRACTING OFFICER'S THIRD MOTION
FOR PARTIAL SUMMARY JUDGMENT
AND APPELLANT'S CROSS MOTION FOR SUMMARY JUDGMENT**

Contracting Officer's Third Motion for Partial Summary Judgment

Upon consideration of the Contracting Officer's Third Motion for Partial Summary Judgment and the Appellant's response thereto, this Board concludes that the motion should be denied. The claim involves the costs of shower surround additions in relation to certain bathtub installations. Grant of the motion would require a determination that there are no material facts in dispute. Making reasonable inferences in favor of Appellant, the Board finds that there are unresolved material facts relating, first, to the alleged December 1, 1993, notice to Brero that DOL intended to revise the requirements for a previously approved product, i.e. the bathtubs; that Brero received a FAX from DMJM/HTB on December 15, 1993, "indicating that the rep was asking BCI for a COP for the shower surround addition"; and, second, to Brero's allegation that it submitted product data sheets to and got approval without exception by the Steinberg Group on April 23, 1993. None of these alleged events are mentioned in the Contracting Officer's statement of undisputed facts. Until the facts relating to them are established, and their significance has been evaluated or stipulated, so that they might be deemed to be undisputed, they must be deemed to be material facts in dispute, and the Contracting Officer's Third Motion for Partial Summary Judgment must be denied.

Appellant's Cross Motion for Summary Judgment

The Board has considered Appellant's Cross Motion for Summary Judgment and initial quantum and concluded that it must be denied. Appellant correctly asserts that in the Contracting Officer's Final Decision dated February 11, 1997, the Contracting Officer admitted entitlement and admitted to partial quantum with respect to several Change Order Proposals. Appellant

requests that the Board enter Partial Summary Judgment as to the Quantum found due and owing in the Contracting Officer's Final Decision, subject to adjustments in costs as proved at trial.

- 2 -

COP #237, #204, #205, #75, #157, and #141 involve various construction changes and related claim amounts totaling \$30,347.00. The Contracting Officer has conceded entitlement and quantum for COP #75 in the amount of \$2,409.00, and has conceded that there are no genuine issues of material fact concerning entitlement and partial quantum with respect to COP's #204, #205, and #141, in the amounts of \$3097.00, \$666.00, and \$16,337.00, respectively. Since there is no dispute of material fact with respect to those four items, summary judgment is properly granted with respect to COP #75, as to entitlement and quantum, and as to COP's #204, #205, and #141, as to entitlement and partial quantum. Interest must be calculated and is payable on the total amounts due from the date of the Contracting Officer's Final Decision, February 11, 1997. Any additional necessary adjustment must await proof.

There are material facts in issue with respect to the two remaining items, COP #237 for \$66.00 and COP #157 for \$7,772.00. Consequently, Appellant's cross motion for partial summary judgment as to those two items must be denied. With respect to COP #237, the Contracting Officer disallowed Appellant's claim for an equitable adjustment for bringing the height of electrical vaults to existing grade as having been required by the contract. There is a dispute as to who was required to perform this work. The Contracting Officer also allowed only \$66 of Appellant's claim of \$1072 for changing seven wall mounted door stops to floor mounted door stops. COP #157 involved Brero's proposals related to three items in dormitory laundry rooms, two of which were accepted by the Contracting Officer. Brero's proposal involving the use of welded wire mesh reinforcement for lightweight concrete floors in those laundry rooms was rejected. These underlying disputes are essentially factual.

Appellant also requests summary judgment as to entitlement with respect to COP #170, relating to Time Extension for Additional Work, and COP #222, relating to Labor Inefficiencies. Appellant cites "Department of Labor documents which clearly and concisely demonstrate" entitlement, which are attached by copy to the motion. These referenced documents consist, in essence, of analyses of delay assessments and related recommendations by a site representative employed by DOL's subcontractor, DMJM/HTB. The Contracting Officer contends that this site representative did not have authority to make determinations concerning the disposition of change order proposals. It would follow that they should not be imputed to the Contracting Officer. The facts underlying the alleged delays and labor inefficiencies are disputed, *inter alia*, in detail in the Contracting Officer's consultant reports. The documents cited by Appellant, therefore, are clearly not binding or otherwise dispositive. Appellant also relies upon a discovered document allegedly

reflecting an offer of settlement by DOL relating to all delay claims/labor inefficiencies. Obviously, such a document, which would admittedly be a component of settlement negotiations, is not presently binding

- 3 -

upon the Contracting Officer or otherwise dispositive. Since material factual issues are in contest, Appellant's cross motion for summary judgment in regard to these issues must be denied.

So ordered.

EDWARD TERHUNE MILLER
Member, Board of Contract Appeals